NO. 21677

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAVERN SPEER,
CHAMPLAIN McCREA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney,

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America

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Attorneys for Appellee,

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellants to be guilty as charged in both counts of a two-count indictment following trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 545 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellants were charged in each count of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. The first count alleged that appellants, with intent to defraud the United States, knowingly and wilfully smuggled approximately 1470 amphetamine tablets into the United States from Mexico [C.T.2].[1/]

The second count alleged that appellants fraudulently and knowingly concealed, and facilitated the transportation and concealment of approximately 1470 amphetamine tablets, which merchandise, as they then and there well knew, had been imported and brought into the United States contrary to law [C.T.3].

Jury trial of appellants commenced on June 7, 1966, before United States District Judge Roger T. Foley [C.T.5]. Appellants were found guilty as charged in both counts on June 8, 1966 [C.T. 7-8].

Thereafter, on June 23, 1966, each appellant was committed to the custody of the Attorney General for three years upon each count, to run concurrently [C.T. 9-10]. Each appellant subsequently filed a timely notice of appeal [C.T. 11-12].

III

ERROR SPECIFIED

Appellants' opening brief specifies the following points upon appeal:

1/ "C. T."refers to the Clerk's Transcript of Record.

"A. Neither defendant received a fair trial in that each should have been represented by separate counsel; and counsel's representation was so ineffective as to reduce trial of defendants to a farce or sham.

"1. Trial counsel apparently failed to recognize an obvious conflict of interest between the defendants, to advise the court of such conflict, and to request that defendants be afforded representation by independent counsel.

"2. Counsel for defendants failed to move for a severance and for separate trials of the defendants.

"3. Counsel for defendants failed to move for a bill of particulars for disclosure prior to trial of evidence regarding an informer, or his communication, for evidence favorable to the defendants, and for disclosure of any statements made by the defendants which the prosecution intended to introduce.

"4. Counsel for defendant failed to object to leading questions by the prosecutor.

"5. Counsel for defendants failed to object to the admission of the inadmissible statements made by defendant McCrea.

"6. Counsel failed to move for a judgment of acquittal at the close of the government's case.

"7. Counsel for defendants offered the overcoat into evidence which was highly prejudicial to defendant McCrea.

"8. Counsel for defendants failed to object to prosecuting attorney's misconduct in closing argument.

"9. Counsel failed to request an instruction that the jury disregard McCrea's extra-judicial statement in determining the guilt of Speer.

"B. The court below erred in failing to grant a judgment of acquittal on its motion at the close of the government's case as to defendant Speer.

"C. The court below erred in failing to grant a judgment of acquittal on its own motion as to both defendants at the close of the government's case.

"D. The court below erred in sustaining an objection to defense counsel's question directed to government witness Ramsey as to whether Ramsey knew whether the pills were in the car prior to entering Mexico.

"E. The court below erred in failing to instruct jury to disregard McCrea's extra-judicial statement as against defendant Speer.

"F. Misconduct of the prosecuting attorney in closing argument was prejudicial to the defendants."

[Appellants' Opening Brief, pp. 4-5].

IV

STATEMENT OF THE FACTS

Appellants McCrea and Speer entered the United States from Mexico in an automobile at San Ysidro, California, on April 2, 1966 [R.T. 8,16,69].[2/] Appellants declared some merchandise to a Customs officer but declared no

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2/ "R.T. refers to the Reporter's Transcript of Proceedings.

amphetamine [R.T. 17,22,30,69]. Appellant McCrea was driving the vehicle. Appellant Speer was the only other occupant [R.T. 16-17, 58-59].

Customs Inspector Donald C. Ramsey found two paper bags in the pocket of an overcoat in the trunk compartment of the vehicle. The coat was underneath other clothing and other items. One paper bag contained 710 amphetamine tablets, and the other one contained 720 amphetamine tablets, according to Inspector Ramsey's best recollection [R.T. 7-8, 18-20,47]. The overcoat was too big to fit appellant Speer properly. Its size was "just right" for appellant McCrea [R.T. 31,53].

Appellant McCrea stated that he could not have bought the pills because he had no money. He said that he and Speer came down for a good time and that Speer financed the venture [R.T. 52,59-61].[3/]

Appellant Speer had about $75 in his possession. He admitted that he had paid the expenses of the trip across the border. In reference to appellant McCrea, Speer stated:

"I even paid for his girl because I had all the money" [R.T. 52,60-61].[4/]

Appellant McCrea testified during the trial and stated that the trip was made in his own vehicle; that the idea of taking the trip probably originated

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3/ The witness appeared to be confused concerning the identity of the defendants and originally attributed McCrea's statements to Speer [R.T. 52, 59,61]

4/ Here again the witness was confused in his testimony and subsequently corrected it [R.T. 52,61].

with both appellants; that he had not had any money since March 3; that Speer had agreed to pay the expenses of the trip; that they had left Los Angeles at about four o'clock; that they crossed the border into Mexico between 7 p.m. and 8 p.m.; that they went to two or three night clubs; that they went to a cab driver who took them to a building which had some girls; and that they went to the Black Cat and then to the Chicago Club [R.T. 65-68,78, 90-91].

Appellant McCrea also testified that they headed back toward the border with two Marines in the car; that they stopped at a liquor store, where Speer bought some liquor; that Speer stated (apparently in reference to one of the bottles): "Let's not break it until we get through the fence"; and that he, McCrea, told the Marines to walk across the border "and we would pick them up on the other side." [R.T. 69,86,88].

He also testified that the overcoat was not in the vehicle when the trip to Mexico commenced; that the two Marines had sat in the vehicle outside of the Chicago Club for about two hours, playing the radio; that the Marines had to have access to the car keys in order to use the radio; that the ignition key was not the key for the trunk; and that one can get into the trunk from the back seat by removing the shelf panel between the back seat and the window [R.T. 71-73,76].

Appellant McCrea testified that he did not know that the amphetamine tablets were in the vehicle; that he would have fled had he known that they were there; and that he had been convicted of two or three felonies. He strongly implied that appellant Speer was innocent [R.T. 70-72, 74-76].

Appellant Speer testified regarding the trip to Tijuana and provided a narrative similar to that of McCrea [R.T. 97-99, 101,114-17]. He testified that he was innocent; that he had never seen the overcoat before; that he agreed to pay McCrea's expenses on the trip; that he was unable to drive an automobile; and that he had three felony convictions [R.T. 102,105-06,108, 110].

The trial Judge commended counsel for appellants after the verdict was rendered:

> "I want to say now that I think Counsel for the defendants did everything that counsel for the defendants could be expected to do and Counsel for the Government was very fair in his presentation of the case." [R.T. 190].

V

ARGUMENT

A. THERE IS NO SHOWING THAT DEFENSE COUNSEL WAS INCOMPETENT.

Appellants contend that their counsel at trial "was so ineffective as to reduce trial of defendants to a farce or sham." (Appellants' Opening Brief, p.4). In support of this assertion, appellants cite various asserted errors by counsel, ranging from failure to object to alleged leading questions to failure to recognize an alleged conflict of interest.

There is a presumption of competency of counsel.

Achtien v. Dowd, 117 F.2d 989, 992 (7th Cir. 1941).

In order to prevail in a claim of incompetency of counsel, an appellant must

show that the trial was "'a mockery of justice, shocking to the conscience of the court.'"

Dodd v. United States, 321 F.2d 240,243 (9th Cir. 1963), quoting from Washington v. United States, 297 F.2d 342 (9th Cir. 1961).

It is particularly difficult for appellants to satisfy this burden where, as here, the issue has not been raised in the trial Court.

Since there was no evidentiary hearing in the trial Court upon the question of competency of counsel, this Court has not been provided with the essential information regarding the thought processes and tactical reasons behind the decisions made by counsel at trial. A similar situation would arise if a judicial body was asked to meet on Monday morning and decide whether a football coach's Saturday decision on the twelfth play of the third quarter indicated such incompetence as to render the game "a farce or sham," without even hearing the coach's reason for the "ineffective" decision. Appellants' suggestion of reversal would open the gates for a vast flood of litigation by unsuccessful defendants, contending that second and third trials (perhaps more) would be required because appellate counsel's theories of trial tactics differ with those of trial counsel, at least in regard to a few of the myriad decisions made upon the spur of the moment during trial.

In Mitchell v. United States, 259 F.2d 787 (C.A.D.C. 1958), the Court of Appeals noted that it is "axiomatic that convicted felons almost unanimously relish the prospect of putting to public judicial test the competence of their erstwhile defenders;" that "almost any judge or lawyer can point to

potential mistakes in reviewing the record of a lost cause"; that "almost every convicted person can think up several points in his trial where the course taken by his lawyer could have been different"; and that "An accused bound to tactical decisions approved by a judge would not get the due process of law we have heretofore known" (at pp. 791,792,793).

The Court also stated (at p.793):

> "Another imperative reason against permitting the procedure sought here is that it would destroy the representation of indigent criminals by the bar. No reputable member of the bar would, nor indeed should, undertake as a public duty the defense of an accused, if the courts were to permit the client thereafter to institute, by allegations as to trial tactics, a public inquiry into the professional competence of the lawyer. This would surely be the end of the lawyers' duty to accept assignments by the courts. One of the great protections of the unfortunate would be gone, destroyed not by the bar but by the courts."

In Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), in which the question of competency of counsel was involved, this Court stated (at p. 37):

> "This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. Due process does not require 'errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance.'"

This statement of the law was recently quoted with approval in Benson v. State Board of Parole & Probation, et al., 9th Cir., October 23, 1967, No. 21,528, and is cited in Eaton v. United States, 9th Cir., October 23, 1967, No. 21574.

Since appellants find fault with their trial counsel's decisions in numerous instances, these will be discussed individually:

(1) The Question of Alleged Conflict of Interest.

There is no showing of a conflict of interest here. Each appellant presented the same defense. Each provided substantially the same narrative of events. Neither attempted to implicate the other. On the contrary, appellant McCrea clearly indicated a belief that Speer was innocent [R.T. 71-72], and Speer supported the key point in McCrea's defense, which was the claim that two Marines were in the vehicle for a while [R.T. 101]. Their defenses were not inconsistent because both were attempting to place the blame upon the missing "Marines", a factor emphasized in closing argument [R.T. 161-62].

In Lugo v. United States, 350 F.2d 858,859 (9th Cir. 1965), this Court declined to "create a conflict of interest out of mere conjecture as to what might have been shown" where "identical defenses - - total disclaimer of knowledge as to how the narcotics got into their car - - were presented by the defendants, and each backed up the other's story."

Appellants evidently decided to sink or swim together. No conflict of interest was found in similar factual situations in Chavira Gonzales v. United States, 314 F.2d 750,752 (9th Cir. 1963), in which the defenses of the

various defendants did not "run afoul of each other," nor in Peek v. United States, 321 F.2d 934 (9th Cir. 1963), cert. denied, 376 U.S. 954 (1964), in which the "interests of appellants were not in conflict with each other." (at p. 944).

It appears that appellants are contending that a conflict of interest existed because McCrea's extra-judicial statement, properly admissible only against McCrea, was "damaging" to Speer. However, assuming that this situation would result in a conflict of interest, the situation did not exist here, because the statement by McCrea was innocuous and unimportant, in light of the fact that Speer's admission of the same facts was admissible in evidence against Speer. McCrea's statement was to the effect that he could not have bought the pills, as he had no money, and that Speer financed the venture (obviously meaning that Speer financed the trip) [R.T. 52,59-61]. Speer admitted to the officers that he paid the expenses of the trip across the border [R.T. 60-61]. Both defendants testified to the same effect [R.T. 91, 105]. Since McCrea's extra-judicial statement was innocuous, its existence could not cause a conflict of interest.

(2) The Question of Severance.

Appellants contend that there should have been a motion for severance, relying upon a state decision which adopts the dissenting opinion in a United States Supreme Court decision. Appellants' argument is based upon the theory that their attorney should have discovered prior to trial that the Government intended to offer McCrea's extra-judicial statement in evidence.

However, as noted under (1) above, McCrea's extra-judicial statement was innocuous under the circumstances. Consequently, it would not furnish ammunition for a severance.

Furthermore, there is no assurance that defense counsel would have discovered the nature of the statement prior to trial. An attorney's failure to move for a bill of particulars does not provide proof of ineffectiveness of counsel.

Rivera v. United States, 318 F.2d 606,608 (9th Cir. 1963).

(3) Failure to Request Pretrial Disclosure.

Appellants argue that their counsel was ineffective because he failed to move for a bill of particulars and other possible discovery matters. Special emphasis is placed upon the possibility of achieving a dismissal if the Government failed to disclose the informant.

However, disclosure of an informant in a routine border-crossing smuggling case ordinarily is not required.

Smith v. United States, 9 F.2d 386,387 (9th Cir. 1925);

Jones v. United States, 326 F.2d 124,127,129 (9th Cir.1963);

Hurst v. United States, 344 F.2d 327,328 (9th Cir. 1965);

Cook v. United States, 354 F.2d 529,531 (9th Cir. 1965);

King v. United States, 348 F.2d 814, 819 (9th Cir. 1965), cert. denied, 382 U. S. 926 (1965);

Alexander v. United States, 362 F.2d 379,383 (9th Cir. 1966);

Garibay-Garcia v. United States, 362 F.2d 509 (9th Cir. 1966);

Aguilar v. United States, 363 F.2d 379,381 (9th Cir. 1966).

Failure to move for a bill of particulars does not indicate incompetence of counsel.

Rivera, supra, at p. 608.

Judicial notice may be taken of the fact that failure to file a formal motion for pretrial discovery is a common occurrence in the defense of criminal cases.

(4) Failure to Object to Questioning By The Prosecutor.

Appellants state that their counsel was ineffective because he failed to object to a leading question and also failed to object to a question regarding testimony by Agent Aros in another case.

The "leading question" was the following:

"Just before you go on, Mr. Aros, did you say anything to the defendants about their rights to consult with an attorney before?" [R.T.51].

Appellants concede that an objection might have been overruled. Even if the objection had been successful, it is difficult to imagine that the Government would have failed to produce the information by additional interrogation. By objecting, counsel would probably have accomplished nothing while giving the jurors the impression that he was attempting to hide the truth on a question having nothing to do with the issue of innocence or guilt. Inexperienced counsel might have objected, but one would hardly expect such fruitless delaying tactics by experienced counsel.

Appellants maintain that the other question to Agent Aros was an attempt to arouse sympathy "for the over-worked, heroic customs agents."

(Appellants' Opening Brief, p. 11). The question was:

"You testified in another case, did you?" [R.T. 55].

This question appeared to be relevant and proper in order to explain the confusion of the witness, who apparently testified in two trials. Failure to object to this innocuous question does not indicate incompetence of counsel.

(5) Failure to Object to Statements by Appellant McCrea.

Appellants contend that their counsel should have objected to the admission of McCrea's statement. As previously noted, the statement was innocuous and was consistent with appellants' testimony at trial.

Appellants argue that the statement was inadmissible due to lack of warning of the right to counsel. However, appellants were advised of the right to counsel [R.T.51]. Since the trial occurred on June 7 and June 8, 1966 [C.T. 5-6], compliance with the guidelines of Miranda v. Arizona, 384 U.S. 436 (1966), was not required.

Johnson v. New Jersey, 384 U.S. 719,734 (1966).

Appellants state that McCrea's statement was not admissible against Speer. In this respect, it was hearsay. Failure to object to hearsay evidence does not indicate ineffectiveness of counsel.

Rivera, supra, at pp.607-08.

Furthermore, little is to be gained by objecting to such innocuous testimony.

(6) Failure to Move For Judgment of Acquittal as to Appellant Speer.

Appellant Speer contends that a motion for judgment of acquittal should have been made at the close of the Government case. He notes that he was

a passenger in a vehicle owned and operated by appellant McCrea and that the pills were found in a coat which fit McCrea but did not fit Speer. He cites Gonzales v. United States, 301 F.2d. 31 (9th Cir. 1962), and Doherty v United States, 318 F.2d 719 (9th Cir. 1963). In both cases, unlike the instant case, the driver and owner of the vehicle in question admitted guilt and claimed that the passenger was innocent.

The instance case comes much closer to the facts of Eason v. United States, 281 F.2d 818 (9th Cir. 1960). In Eason, the two appellants were driver and passenger in a vehicle containing marihuana, seconal, and amphetamine. The evidence against them consisted of the fact that they were nervous, one of them owned the vehicle, and they had travelled together on the trip to Tijuana, being together "most of the time." (at p.820). Co-defendant Nowlin provided the gasoline and food for the trip. This Court affirmed the conviction of both passenger and driver, noting that "the evidenc of close friendship, joint venture and general conduct were sufficient to warrant a reasonable jury finding beyond reasonable doubt that possession was joint." (at p. 821).

The similarity between Eason and the instant case is remarkable. Here, appellant McCrea furnished the vehicle and appellant Speer furnished money [R.T. 60-61,65]. In view of the decision in Eason, it is respectfully submitted that failure to move for judgment of acquittal did not indicate incompetence of counsel, i.e., was not such conduct as to reduce the trial to the level of "a mockery of justice, shocking to the conscience of the court."

(7) Failure to Move For Judgment of Acquittal as to Appellant McCrea.

Appellant McCrea contends that his trial counsel demonstrated incompetence by failing to move for a judgment of acquittal upon the ground that there was no evidence that he had entered the United States.

There was considerable testimony regarding location of traffic routes and Customs facilities in relation to a diagram showing the border area [R.T. 9-13]. Since appellant McCrea did not include this important diagram as part of the record upon appeal, it is not possible for him to demonstrate that his counsel was incompetent in regard to a question of proof of entry. Furthermore, a witness testified that the vehicle in question was brought to Inspector Ramsey by Inspector Wells; that Inspector Wells was working under the canopy; that "Automobiles coming from under the canopy through the inspection lane would be coming from Mexico going north to the United States"; that the vehicle in question was stopped at the initial check point; and that the occupants were asked what they were bringing from Mexico, replying that they had a bottle of Tequila [R.T. 13-14,16,22,30]. Consequently, it is respectfully submitted that there was sufficient evidence of entry from Mexico to justify competent counsel in refraining from making a motion for judgment of acquittal. He may have considered the probability that the Court would permit the Government to reopen its case in the unlikely event that such a hypertechnical motion for judgment of acquittal was meritorious.

(8) The Offer of the Overcoat in Evidence.

Appellants contend that their trial counsel should not have offered the

coat in evidence. Since trial counsel took the position that the coat "possibly would fit fifty percent of the men in this United States . . ." [R.T. 164] and that the coat was so delapidated that neither appellant would be likely to wear such a coat, more fitting for "some poor Mexican" smuggler [R.T. 162], he had good reason to offer the coat in evidence. This does not indicate incompetence. The jury already had heard testimony to the effect that the coat fit appellant McCrea [R.T. 53]. It was admissible in evidence as a Government exhibit, so it probably would have been received in evidence without a request by appellants.

(9) Failure to Object to Alleged Misconduct.

Appellants maintain that their trial counsel indicated incompetence by failing to object to two comments by the prosecuting attorney.

The first of these was the statement that Agent Aros testified in two trials in one morning [R.T. 170]. This possibly amounted to an inconsequential addition to the evidence, which involved the testimony that Agent Aros testified in another case [R.T. 55], without reference to the date. A dignified presentation of the defense would require interruption of argument to the jury in matters of substantial importance but not in matters of insignificance.

The other questioned comment was the statement to the jury to the effect that "if there were any additional evidence available, you would certainly have it." [R.T. 167]. Appellants note that there was an informant, but they provide no evidence that he was "available." Furthermore, since the experienced trial Judge instructed the jury that "Counsel have brought to your

consideration all the facts and evidence within their reach, which, in their judgment, will assist you in determining the truth" [R.T. 182], it hardly seems plausible that defense counsel's failure to object to a similar earlier statement by the prosecuting attorney would have reduced the trial to "a mockery of justice."

(10) Failure to Request an Instruction Relating to Appellant McCrea's Extra-Judicial Statement.

Appellants maintain that their trial counsel was incompetent because he failed to request an instruction to the effect that appellant McCrea's statement was not to be considered in the case of appellant Speer.

Since the extra-judicial statement was unimportant, there was no need for such an instruction.

B. THE COURT WAS NOT REQUIRED TO GRANT A JUDGMENT OF ACQUITTAL UPON ITS OWN MOTION IN THE CASE OF APPELLANT SPEER.

Appellant Speer contends that the trial Court should have made a motion for judgment of acquittal upon behalf of appellant Speer at the close of the Government case and then should have ruled in favor of its own motion. No authority is cited for this remarkable proposition. A trial judge is not an advocate. The concept of an impartial judge is basic to our system of justice.

Mitchell, supra, at p. 793.

C. THE COURT WAS NOT REQUIRED TO GRANT A JUDGMENT OF ACQUITTAL UPON ITS OWN MOTION IN THE CASE OF APPELLANT McCREA.

Appellant McCrea also contends that the trial Judge should have made a motion for judgment of acquittal upon his behalf and should have granted it. He cites Kramer v. United States, 147 F.2d 202 (9th Cir.1945), which does not support his position.

Apparently he is contending that there was no direct evidence that appellants entered the United States. However, as noted under A(7) above, there was adequate evidence of entry, even without considering the diagram evidence which appellants have failed to bring before this Court.

D. THE TRIAL COURT'S RULING UPON AN OBJECTION TO INSPECTOR RAMSEY'S TESTIMONY DID NOT CONSTITUTE ERROR.

Appellants assert that the trial Judge committed error in sustaining an objection to defense counsel's question regarding Inspector Ramsey's knowledge concerning the location of the pills before the vehicle went to Mexico. The record demonstrates that the objection was not sustained. It was overruled [R.T. 24,26].

E. THE TRIAL COURT DID NOT COMMIT ERROR BY FAILING TO INSTRUCT THE JURY TO DISREGARD McCREA'S EXTRA-JUDICIAL STATEMENT IN SPEER'S CASE.

Since the trial Court was not requested to instruct the jury to disregard

appellant McCrea's extra-judicial statement in the case of appellant Speer, and since the extra-judicial statement was innocuous and unimportant to the case, it is respectfully submitted that failure to give the unrequested instruction did not constitute error.

F. THE PROSECUTING ATTORNEY DID NOT COMMIT MISCONDUCT IN HIS CLOSING ARGUMENT.

The statement by the prosecuting attorney to the jury to the effect that Agent Aros had testified in two trials in one morning [R.T. 170] was not prejudicial to appellants, in view of the testimony that he "testified in another case . . ." [R.T. 55]. A conclusion that the other trial occurred on the same morning was a natural inference from the testimony. Consequently, the remark did not constitute misconduct.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

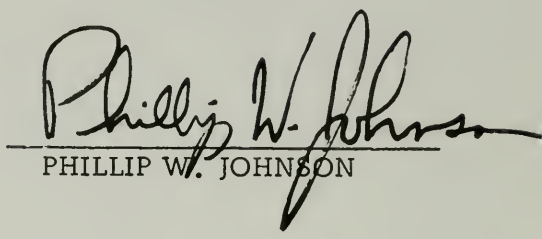
EDWIN L. MILLER, JR.
United States Attorney

PHILLIP W. JOHNSON
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON